

FEDERAL MARITIME COMMISSION

VERUCCI MOTORCYCLES, LLC.

v.

SENATOR INTERNATIONAL OCEAN,
LLC

Docket No. 06-05

Served: May 7, 2008

BY THE COMMISSION: A. Paul ANDERSON, Harold J. CREEL, Jr., and Rebecca F. DYE, *Commissioners*; Commissioner Joseph E. BRENNAN, dissenting.

Order Reopening the Proceeding

Pro se Complainant, Verucci Motorcycles, LLC ("Complainant" or "Verucci") filed a motion requesting that its case not be dismissed so that it can submit evidence to prove allegations that Senator International Ocean, LLC ("Senator") violated Section 10 of the Shipping Act of 1984. Motion, pp. 1-2. In this motion, Verucci explained that its President, the senior Mr. Hachar, experienced health problems and frequent hospital stays which contributed substantially to Verucci's inadequate response to the Administrative Law Judge Guthridge ("ALJ") orders. *Id.*

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We have determined to accept Verucci's filing as a motion under Commission Rule 230;¹ and will reopen the proceeding by remanding it to the ALJ consistent with our further instructions set forth below.

BACKGROUND

Verucci initiated this proceeding without an attorney, alleging that Senator misdeclared its cargo; failed to fulfill its agreement with Verucci; failed to carry out transportation obligations; misrepresented itself as a customs broker and freight forwarder; refused to deal or negotiate; and engaged in unfair or unjust practices in violation of Section 10 of the Shipping Act of

¹ 46 CFR § 502.230 Reopening by presiding officer or Commission.

(a) *Motion to reopen.* At any time after the conclusion of a hearing in a proceeding, but before issuance by the presiding officer of a recommended or initial decision, any party to the proceeding may file with the presiding officer a motion to reopen the proceeding for the purpose of receiving additional evidence. A motion to reopen shall be served in conformity with the requirements of Subpart H and shall set forth the grounds requiring reopening of the proceeding, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing.

(b) *Reply.* Within ten (10) days following service of a motion to reopen, any party may reply to such motion.

(c) *Reopening by presiding officer.* At any time prior to filing his or her decision, the presiding officer upon his or her own motion may reopen a proceeding for the reception of further evidence.

(d) *Reopening by the Commission.* Where a decision has been issued by the presiding officer or where a decision by the presiding officer has been omitted, but before issuance of a Commission decision, the Commission may, after petition and reply in conformity with paragraphs (a) and (b) of this section, or upon its own motion, reopen a proceeding for the purpose of taking further evidence.

1984. Complaint, pp.1-3. Senator filed an answer to the complaint denying these allegations and asserting that the Commission lacked subject matter jurisdiction. Answer and Affirmative Defenses, pp. 1-3. Thereafter, on August 15, 2006, Respondent Senator submitted its Motion to Dismiss for Lack of Jurisdiction Over the Subject Matter and Failure to State a Cause of Action, or in the Alternative a Motion for Summary Judgment.

From this point in the proceeding onward, Verucci has in most respects failed in its obligations to make required filings in the prosecution of its own complaint.

On February 21, 2008, the ALJ issued an order requiring Verucci to show cause on or before March 7, 2008 why its complaint should not be dismissed. Verucci likewise failed to file a timely response to this order. In consequence of Verucci's repeated failures, the ALJ dismissed Verucci's complaint by Order dated March 13, 2008.

On April 10, 2008, Verucci belatedly requested that its case not be dismissed so that it could submit evidence proving its allegations against Senator. Verucci indicated that it did not intend to disregard the ALJ's Orders. It also asserted that its President, the senior Mr. Hachar, experienced significant health problems and frequent hospital stays which contributed substantially to Verucci's inadequate response to the ALJ's Orders. *Id.* Senator has opposed the April 10 Motion, requesting that the Commission not disturb the ALJ's order of dismissal on the basis that Verucci repeatedly neglected to follow lawful procedural orders in this matter.

DISCUSSION

Rule 230 provides that the Commission may reopen a proceeding to take additional evidence upon its own motion or after receipt of a petition and reply thereto. Here Verucci filed a late response to the ALJ's Order directing Complainant to show cause why Verucci's complaint should not be dismissed. While

Verucci's response does not cite to the Commission's rules, it contends that it has significant evidence to prove its claim against Senator and requests an opportunity to present that evidence. Motion, at 1.

It is well settled that the courts are to liberally construe *pro se* pleadings. *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 n.2 (D.C. Cir. 2000). Moreover, the Court's instruction has been construed to apply to all filings by a *pro se* litigant, not just to the pleadings alone. *Richardson v. United States*, 193 F.3d 545, 548 (D.C. Cir. 1999). See also, *Verucci Motorcycles LLC v. Senator International Ocean LLC*, 30 S.R.R. 1388, 1391 (ALJ, March 22, 2007). Courts must look to the substance of a motion rather than how it is labeled. *Butler v. Pearson*, 636 F.2d 526, 529 (D.C. Cir. 1980). Consistent with the courts' treatment of *pro se* litigants and pleadings, administrative agencies like this Commission have tended ". . . to be more lenient even than courts in such matters." *Bernard & Weldcraft Welding Equipment v. Supertrans International Inc.*, 29 S.R.R. 1338, 1342 (ALJ, 2002)

Having considered the content of Verucci's April 10 filing in light of the Commission's rules, we have determined to accept the filing as a motion to reopen the proceeding under Commission Rule 230. The Commission traditionally has sought to "do equity" rather than permit a party to be cut off from an opportunity to be heard due to a rigid or mechanical application of the Commission's rules. See *City of Portland v. PWC*, 5 FMC 118, 129-130 (1956); *E.S.B. Inc. v. Moore McCormack Lines Inc.*, 19 FMC 480, 481 (1977); *Bernard & Weldcraft Welding Equipment v. Supertrans International Inc.*, 29 S.R.R. at 1339-40; *Marine Surveyors Guild Inc. v. Cooper/T. Smith Corp.*, 24 S.R.R. 628, 629 (ALJ, 1987).

Moreover, this decision will not affect Senator's ability to raise any substantive defense to which it is entitled. Provided that Verucci strictly adheres to this Order and any subsequent procedures the ALJ orders from this point forward, the burden

upon Senator, in time and money, is substantially the same as if Verucci had timely complied with all ALJ orders. Likewise, Verucci's affirmative burden to present probative evidence supporting its claims against Senator remains unchanged, as does the obligation of the Commission ultimately to decide the case only upon the merits.

Accordingly, the case will be remanded to the ALJ for further proceedings.² In order that the Commission can ensure judicial economy in any subsequent proceedings, Verucci will be directed to file its prehearing statement under 46 CFR § 502.95 ("Rule 95 Statement") and to supplement its responses as directed in the ALJ's December 21, 2007 order, within 45 days from this Order. If Verucci fails to make the filings within the 45 days allowed, the ALJ is directed to dismiss this proceeding with prejudice. *See Safbank Line Ltd. v. The Hairlox Co. Inc.*, 25 S.R.R. 719, 720 (FMC 1990).

CONCLUSION

THEREFORE, IT IS ORDERED, That Verucci's filing of April 10, 2008 will be accepted as a motion to reopen the proceeding pursuant to Commission Rule 230;

IT IS FURTHER ORDERED, That this proceeding is reopened pursuant to Commission Rule 230 for the purpose of taking further evidence, and is remanded to the presiding Administrative Law Judge;

IT IS FURTHER ORDERED, That upon remand, the Administrative Law Judge shall instruct the parties upon the availability of alternative dispute resolution (ADR), and shall determine whether the matter should be referred to the Office of

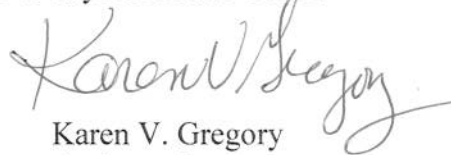
² In addition, the record fails to adequately indicate whether Verucci and Senator have given consideration to the use of alternative dispute resolution. *See* Commission Rule 91, 46 CFR § 502.91.

Consumer Affairs and Dispute Resolution Services to assist the parties;

IT IS FURTHER ORDERED, That the Complainant is directed to submit its Rule 95 Statement and to supplement its responses as directed in the ALJ's December 21, 2007 Order, within 45 days from the date of this Order; Complainant is instructed to strictly adhere to such orders as may be issued by the ALJ henceforth; and

IT IS FINALLY ORDERED, That the ALJ shall dismiss this proceeding with prejudice if Verucci fails to file its Rule 95 Statement and to supplement its responses as directed in the ALJ's December 21, 2007 Order, within 45 days from this Order.

By the Commission.

A handwritten signature in cursive script, appearing to read "Karen V. Gregory".

Karen V. Gregory
Assistant Secretary